

## **The liability of roads authorities revisited**

Russell, Eleanor J.

*Published in:*  
Juridical Review

*Publication date:*  
2018

*Document Version*  
Author accepted manuscript

[Link to publication in ResearchOnline](#)

*Citation for published version (Harvard):*  
Russell, EJ 2018, 'The liability of roads authorities revisited', *Juridical Review*, vol. 4, pp. 283-291.  
<<http://www.sweetandmaxwell.co.uk/wgreen/juridicial-review.htm>>

### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

### **Take down policy**

If you believe that this document breaches copyright please view our takedown policy at <https://edshare.gcu.ac.uk/id/eprint/5179> for details of how to contact us.

## The liability of roads authorities revisited

Eleanor J Russell\*

### Introduction

Recent years have witnessed much litigation against roads authorities in circumstances where injuries have been said to result from dangers on or about the roadway. The Scottish courts, unlike their English counterparts,<sup>1</sup> have long recognised that, at common law, liability may be incurred by roads authorities to those using the roads in respect of hazards thereon. That principle is restated in the Inner House decision in *Macdonald v Aberdeenshire Council*<sup>2</sup> and is applied in a number of subsequent cases which are examined here and from which practical guidance can be drawn.

### Liability of roads authorities in Scotland

The general powers and duties of local roads authorities in Scotland are found in the Roads (Scotland) Act 1984.<sup>3</sup> Section 1(1) of the Act provides that a local roads authority 'shall manage and maintain' all roads<sup>4</sup> in its area as are entered in its 'list of public roads'. Extensive powers are conferred in this regard including the "power to reconstruct, alter, widen, improve or renew any such road or to determine the means by which the public right of passage over it may be exercised." Section 1 does not however impose any *obligation* on a roads authority *to persons using the road*. Accordingly, any liability of a roads authority to road users must be sought in the general law of negligence. Writing in 1899, Guthrie set out the principle governing the liability of magistrates and road trustees as follows:

"[T]he general rule is now fixed, that statutory trustees and local authorities, unless the statute under which they act provide otherwise, are liable to make good in their corporate capacity and out of their public funds, the damage caused by their own or their servants' fault, in the same way as individuals. The magistrates of a burgh, being charged with the duty of keeping the streets in good order, are liable in damages to persons injured by their being in an unsafe condition."<sup>5</sup>

Guthrie noted that this principle was supported by case law. An early example is *Innes v Magistrates of Edinburgh*.<sup>6</sup> There, the pursuer broke his thighbone when he fell into an unguarded pit in an Edinburgh lane. An action for damages against the magistrates (as the persons responsible for the city's streets) was held to be well founded. The streets of a burgh were under the control of the magistrates and they

---

\* Glasgow Caledonian University

<sup>1</sup> In English common law, until relatively recently, highway authorities and their predecessors enjoyed immunity from civil liability in relation to failure to repair: see *Russell v Men of Devon* (1788) 2 Term. Rep 667

<sup>2</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114

<sup>3</sup> For an overview of this area of law, see Ann Faulds, Trudi Craggs and John Saunders, *Scottish Roads Law*, 2<sup>nd</sup> edn (Edinburgh, Tottel, 2008)

<sup>4</sup> "Road" is defined in s.151(1) as "any way ...over which there is a public right of passage...and includes the road's verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes".

<sup>5</sup> Bell, GJ, *Principles of the Law of Scotland* (10th Guthrie ed, Butterworths/Law Society of Scotland, Edinburgh, 1899), sec 661, para 2031

<sup>6</sup> *Innes v Magistrates of Edinburgh* (1798) Mor 13189

were responsible for negligently inflicted injury resulting from dangers in the streets, under ordinary principles of delictual responsibility.

Later cases disclosed a similar approach. *McFee and Ors v Police Commissioners of Broughty Ferry*<sup>7</sup> arose following the death of a cab driver when his head struck a railway bridge which was of insufficient height to allow a cab to pass. The police commissioners had taken over the road in question as a public street. The Lord Justice Clerk articulated the nature of the commissioners' duty in the following terms:<sup>8</sup>

"If anything occurs to create a danger on [the roads of which they have the control], it is their duty to guard against it. It is their business not to allow traffic to pass along the road until they have either put the road into a proper state, or (if they desire to maintain that another person or body is liable to do so) until they have caused that person or body to perform the duty."

In *Strachan v Aberdeen District Committee of the County Council of Aberdeenshire*<sup>9</sup> the Inner House held that a claim of damages was competent against the county council for injuries arising from its failure to keep a road adequately fenced. Apart from a "temporary eclipse"<sup>10</sup> of the principle (which followed the decision in *Findlater v Duncan*<sup>11</sup>) the courts in Scotland have accepted for over 200 years that roads authorities (and their predecessors) are liable for known defects in or around the roadway.<sup>12</sup>

### **A trilogy of recent cases**

Against that background of a considerable (and almost unbroken) line of authority, attention is now turned to a trilogy of recent cases which challenge that traditional Scottish approach - *Macdonald v Aberdeenshire Council*,<sup>13</sup> *Bowes v Highland Council*<sup>14</sup> and *Dewar v Scottish Borders Council*.<sup>15</sup>

*Macdonald* concerned an accident which occurred when the pursuer, who was travelling on a class C country road, drove through a crossroads into the path of a van travelling on a class A road. The pursuer was injured and her passengers were killed. In an action of damages against the roads authority, the pursuer averred that the configuration of the road rendered visibility of the junction poor, that the road

---

<sup>7</sup> *McFee and Ors v Police Commissioners of Broughty Ferry* (1890) 17 R 764

<sup>8</sup> *McFee and Ors v Police Commissioners of Broughty Ferry* (1890) 17 R 764 at 767

<sup>9</sup> *Strachan v Aberdeen District Committee of the County Council of Aberdeenshire* (1894) 21 R 915

<sup>10</sup> See *Strachan v Aberdeen District Committee of the County Council of Aberdeenshire* (1894) 21 R 915 per Lord McLaren at 920.

<sup>11</sup> *Findlater v Duncan* (1838) 16 S. 1150. This "eclipse" was short lived and, in any event, immunity appeared to operate only in relation to turnpike roads.

<sup>12</sup> *Smith v Middleton (No. 1)* 1971 S.L.T. (Notes) 65; *McKnight v Clydeside Buses Ltd* 1999 S.L.T. 1167. More recently, it has been stated that "there is sufficient authority...for the existence in Scots law of a duty owed at common law by a roads authority to road users to take reasonable care to see that they do not suffer injury as a consequence of the presence of ice on a public road." (per Lord Tyre in *Ryder v Highland Council* 2013 S.L.T. 847 at [49]). It was held however that the matter of whether to operate a 24 hour gritting system was one of operational priorities which was not justiciable.

<sup>13</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114

<sup>14</sup> *Bowes v Highland Council* 2017 S.L.T. 749

<sup>15</sup> *Dewar v Scottish Borders Council* [2017] CSOH 68; 2017 G.W.D. 15-250

markings had been worn away, that a “Give Way” sign was not obvious and that consequently she was unaware that she was approaching a junction where she was required to give way. She asserted that the authority had created a danger to road users and had failed to take reasonable care to devise, institute and maintain a reasonable system of installation, inspection and repair of the road markings and signage at the junction. Lord Uist, in the Outer House,<sup>16</sup> dismissed the action on the grounds that the defenders did not owe any duty of care to the pursuer as a user of a road under their control. In so holding, the Lord Ordinary followed the decision of Lord Stott in *Murray v Nicholls*<sup>17</sup> as approved by Lord Rodger in *Gorringe v Calderdale Metropolitan Borough Council*.<sup>18</sup> The pursuer reclaimed, asserting that her pleadings *did* disclose a relevant case against the roads authority as a matter of Scots law. The reclaiming motion came before an Extra Division of the Inner House comprising Lady Paton, Lord Drummond Young and Lord Wheatley.

Lady Paton observed that, in terms of the Roads (Scotland) Act 1984, the authority had the right and *power* to repaint the lines and to reposition or add further road signs but she did not accept that the defenders owed the pursuer a common law duty of care to do so. The existence of a duty depended upon the facts and circumstances of each case. In her Ladyship’s view, drivers using the crossroads were in a sufficiently proximate relationship to the authority to give rise to a duty of care. It was not, however, reasonably foreseeable that an accident was likely to occur at the junction. The wearing away of the lines had been a gradual process and there were no averments of complaints in this regard or about the location of the “Give Way” sign. Nor, in Lady Paton’s view, was it fair, just and reasonable to impose a duty of care on the defenders as the situation at the crossroads did not present as a high priority situation with obvious danger demanding prompt attention from the authority “burdened as it [was] with many tasks and duties to perform.”<sup>19</sup>

Lord Drummond Young, having reviewed numerous Scottish authorities, offered the following formulation of the present state of Scots law:<sup>20</sup>

“A roads authority is liable in negligence at common law for any failure to deal with a hazard that exists on the roads under its control. A ‘hazard’ for this purpose is something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care.”

His Lordship drew attention to the use of the words “danger” or “dangerous” in the authorities and continued:<sup>21</sup>

“This means that, for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, two features must exist. First, the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user. Secondly, the authority must be at fault in failing to deal with the hazard. This means that the pursuer must establish that a roads authority of ordinary competence

---

<sup>16</sup> *Macdonald v Aberdeenshire Council* [2012] CSOH 101

<sup>17</sup> *Murray v Nicholls* 1983 S.L.T. 194

<sup>18</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 W.L.R. 1057

<sup>19</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [43]

<sup>20</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [63]

<sup>21</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [64]

using reasonable care would have identified the hazard and would have taken steps to correct it, whether by altering the road, or by placing suitable signs, or in an extreme case by closing the road.”

The first requirement allows a roads authority to assume that road users will proceed with reasonable skill and care, paying heed to obvious dangers on the road and driving accordingly. There is no obligation on a roads authority to protect drivers from anything that is obvious e.g. bends, blind summits, visible road junctions, and the fact that the driver's view is restricted by buildings, vegetation, land features or the configuration of the road. In such a situation, a careful driver should slow down and look carefully ahead. If he does not do so, the accident is his own fault. The second requirement means that the hazard must be apparent to a competent roads engineer. Lord Drummond Young stated:<sup>22</sup>

“[T]his state of the law strikes a fair and reasonable balance between the interests of drivers and their passengers on one hand and the interests of the roads authority on the other hand... Eliminating hazards, in the sense discussed above, is the minimum that can be expected of [roads authorities]. The fundamental fairness of such a duty is supported by consideration of the insurance implications of an accident. Third party motor insurance is of course compulsory, and if an accident is caused by a driver's fault those who are injured, including his passengers, may expect to obtain recovery from his insurer. If the driver is not at fault, however, there can be no recovery, from the insurer or the driver. If an accident occurs because of a hazard, in the sense discussed above, the critical point is that there is no fault on the part of the driver; it is the road that is dangerous rather than the driver. In such a case, therefore, passengers will only recover anything if the roads authority is liable.”

Lord Drummond Young observed that the law has not developed along parallel lines north and south of the border.<sup>23</sup> Scots law, which holds that roads authorities are subject to a common law duty to road users, was developed through a series of cases extending over 200 years and possibly had its origins in Roman law.<sup>24</sup> English law, on the other hand, holds that no duty is owed by a roads authority to road users *at common law*. The respondents' argument in *Macdonald* was that Scots law should ignore its own traditions and should follow English law. Lord Drummond Young observed that “English law was always different”<sup>25</sup> but that there was “nothing intrinsically undesirable about such a difference.”<sup>26</sup> In his view, Scots law operated rationally in allowing for liability to be imposed in respect of hazards. There was a clear economic justification for the Scottish approach in that redress could be provided in cases which are not covered by the compulsory system of motor insurance. Furthermore, the cost of eliminating hazards would not be unduly

---

<sup>22</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [65]

<sup>23</sup> Lord Drummond Young emphasized (at [78]) that the civil liability of a roads authority in Scotland does not arise by implication from its statutory powers. Rather, it is a common law liability which was imposed well before the modern statutory system of roads legislation came into being.

<sup>24</sup> Lord Drummond Young made reference to *Innes v Magistrates of Edinburgh* (and the references therein to the Digest) and stated that “the magistrates appear to have been liable under the *lex aquilia* for wrongful loss occasioned by municipal property.” (*Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [72])

<sup>25</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [72]

<sup>26</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [73]

burdensome for a roads authority which took its responsibilities seriously. Lord Drummond Young discerned no reason for Scots law to follow English cases. Nonetheless, the English cases did make some general points about the law of negligence and it was appropriate to examine them to ascertain whether Scots law reflected the policy considerations which underpinned the English decisions. Under the tripartite approach of *Caparo Industries plc v Dickman*,<sup>27</sup> the existence of a duty depended upon foreseeability of damage, proximity of relationship and whether it was fair, just and reasonable to impose a duty. As *Caparo* had been adopted into Scots law, it was necessary to consider whether the Scots law rule that a roads authority might be liable to road users in negligence was fair and reasonable. Lord Drummond Young concluded that it was, perhaps more so than the current English approach. In so concluding, his Lordship had regard to the context, “a context which includes the system of motor insurance.”<sup>28</sup>

Lord Hoffmann in *Gorringe*<sup>29</sup> had asserted that there was no need for highways authorities to be liable for accidents, and that compulsory third-party insurance was intended to ensure that compensation could be paid to those injured by careless driving. Lord Drummond Young expressed his agreement with that as a general proposition but observed that some accidents are caused by hazards which a careful driver would not see. Those cases were not covered by the system of insurance. It was in such circumstances that the Scottish common law duty came into operation- it provided “compensation for a limited category of accidents that are not caused by any fault of the drivers concerned.”<sup>30</sup>

Lord Rodger in *Gorringe* had asserted that Scots common law is “somewhat more generous to those injured due to the failure to maintain the roads than was English common law.”<sup>31</sup> Lord Drummond Young reiterated that point but noted that much of what was said in *Gorringe* “supports the general approach of the Scottish common law.”<sup>32</sup> Nonetheless, Lord Drummond Young concluded that .<sup>33</sup>

“English law is different from Scots law, but ... Scots law is quite coherent as it stands and has no need to move into line with English law. Many of the differences between Scots and English law are historical in nature, and the statutory background is quite different; consequently there are dangers in adopting the law of one jurisdiction uncritically into the other.”

Turning to the pursuer’s pleadings, Lord Drummond Young highlighted the averments that there were buildings and yards situated on either side of the C road on which the pursuer was travelling and, because of a dip in the road which entered into a rising left hand bend, there was no advance view of the junction. Lord Drummond Young stated that “the risk of something unseen might be thought to be obvious, and in that event it would be appropriate to slow down.”<sup>34</sup> Significantly, the pursuer’s pleadings did not address adequately the critical question of whether there

---

<sup>27</sup> *Caparo Industries plc v Dickman* [1990] 2 A.C. 605

<sup>28</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [75]

<sup>29</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 W.L.R. 1057 at [35]-[36]

<sup>30</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [78]

<sup>31</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 W.L.R. 1057 at [84]

<sup>32</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [83]

<sup>33</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [54]

<sup>34</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [84]

was a 'hazard'. Rather, they were suggestive of an obvious danger. There were no averments of complaints or of any history of accidents at the locus. Lord Drummond Young stressed that "the need for averments from which the existence of a hazard can be inferred is fundamental, and in the absence of any such averments the pursuer's case must be irrelevant."<sup>35</sup>

*Macdonald* was subsequently applied in *Bowes*.<sup>36</sup> There, a driver was killed after his pickup truck struck a weakened parapet on the Kyle of Tongue bridge. Rather than propelling the driver back into the carriageway as it ought to have done, the parapet "unzipped" and a section of it swung out from the bridge. The driver's truck left the bridge, falling into the water below and the driver drowned. The roads authority's engineer had reported defects in the bridge several years previously. He had categorized defects to the parapet as severe and recommended that repairs be carried out within the following financial year. He also recommended that the bridge parapet condition should be checked twice yearly to monitor deterioration until parapet replacement was effected. Although such a system of monitoring was instituted, it was subsequently discontinued. Notwithstanding the engineer's recommendation that interim measures be put in place pending replacement of the parapet, the authority had failed to institute appropriate interim measures to deal with the unknown containment capacity of the parapet.

Although it has been said that "in practice, it may be difficult to ascertain what constitutes a hazard,"<sup>37</sup> Lord Mulholland had no such difficulty in *Bowes*. Indeed, he was quick to reject the defender's contention that the weakened parapet was not a hazard. It was defective and its containment capacity was unknown. It posed a danger to road users and there was a significant risk of an accident caused by it. The authority argued that a parapet was not designed for careful road users but rather for drivers who were at fault. The Lord Ordinary disagreed. While a parapet may come to the aid of drivers at fault, it could also assist drivers who were not at fault such as those suffering heart attacks and losing consciousness and those shunted from behind. Mr Bowes was entitled to rely on the parapet. Had it been functioning as designed, his truck would not have left the bridge and he would not have drowned.

Having ascertained that a hazard existed, Lord Mulholland turned to the issue of whether the authority was at fault in failing to deal with the hazard prior to the accident. The authority had knowledge of the hazard some five years prior to the accident. There was a pressing need to address this hazard and a reasonable authority would have implemented interim measures (such as speed reduction, single lane carriage and temporary barriers) pending the replacement of the parapet. Had the authority done so, Mr Bowes' death would have been prevented. The two stage test propounded by Lord Drummond Young in *Macdonald* was accordingly satisfied and the council was found liable.<sup>38</sup>

---

<sup>35</sup> *Macdonald v Aberdeenshire Council* 2014. S.C. 114 at [87]

<sup>36</sup> *Bowes v Highland Council* 2017 S.L.T. 749. *Bowes* is subject to detailed examination in Eleanor J Russell, "Weak Parapets: Protecting the travelling public" 2017 S.L.T. (News) 113. The Outer House judgment is also discussed in Martin Hogg, Obligations Law Blog, March 6, 2018 (accessible at <http://www.obligations.law.ed.ac.uk/>)

<sup>37</sup> Francis McManus, "Case Comment - Delictual liability of roads authorities" 2014 S.P.E.L. 89 at 90

<sup>38</sup> The Inner House subsequently affirmed that decision (2018 S.L.T. 757) but concluded that the deceased had been contributorily negligent.

The result was otherwise in *Dewar v Scottish Borders Council*.<sup>39</sup> There, the pursuer was injured in a motorcycle accident on the A701 road. At a double bend, he encountered a damaged area of road surface whereupon his motorcycle left the road and continued onto a grass verge. The motorcycle's front wheel struck a large stone and the pursuer was thrown from the motorcycle and sustained serious injuries. He raised an action for damages against the Scottish Borders Council in which he averred that the accident was caused by a dangerous defect in the road, which the defenders had negligently failed to inspect, maintain and repair. The case came before Lord Pentland for a proof before answer on the issue of liability.

The pursuer asserted that the eroded area constituted a "hazard" which gave rise to a significant risk of an accident to a careful road user and that the defenders were at fault in failing to deal with the hazard before his accident. The defenders denied that they were at fault. They maintained that they had a reasonable system of road inspection and that the road was properly inspected and maintained. Whilst they acknowledged that there was some erosion of the carriageway surface, they contended that it was not of sufficient severity to warrant repair in terms of their maintenance and repair policy. The defenders' position was that the road was not dangerous to a motorcyclist, so long as he exercised reasonable care.

The extent of the damage was the subject of disputed evidence at the proof. Two police officers who attended the scene of the accident gave evidence. One described the condition of the road surface as "horrendous." He estimated the defective area to be 40mm to 50mm deep and in the line of a typical tyre track for a motorcycle negotiating the right-hand bend. The other indicated that the eroded area was between 25 and 50mm deep at different points. The pursuer also led expert evidence from a chartered civil engineer who said the defect was about 50mm deep and 12 to 17 metres in length. This presented a significant potential hazard to road users and the defenders should have identified and repaired it before the accident. The witness thought that the defenders' inspector could be criticised for not noting it.

The defenders led evidence from the collision investigator who considered the road surface to be not atypical of other sections of the A701 or similar roads. He described it as breaking up slightly on the left-hand side. Kenneth McCudden, the defenders' roads inspector, also gave evidence. He explained the council's system for inspecting, maintaining and repairing its roads. The council's guidance prescribed reaction times for certain categories of road defects. Category 1a defects -those which presented an immediate and critical hazard to road users -required to be immediately made safe and repaired. Category 1b defects -those which presented an urgent or imminent hazard or risk of rapid deterioration- were to be made safe or repaired within 48 hours. This category included potholes exceeding 40mm in the wheel track. Category 1c defects -those which presented a moderate level of hazard or risk- were to be repaired within 7 days. This category included potholes exceeding 40mm in depth in all other locations (i.e. other than in the wheel track). Category 2 defects did not represent an immediate danger and were to be repaired within a planned programme of works. 'A' class roads were inspected on a monthly basis. Mr McCudden inspected the relevant section of road some 24 days before the accident. He then completed a safety inspection sheet which indicated that no action was

---

<sup>39</sup> *Dewar v Scottish Borders Council* [2017] CSOH 68; 2017 G.W.D. 15-250



required. He described the damaged area as a slight unevenness at the road edge where he thought that 10 to 20mm of surface dressing had come off. He would not classify this as a Category 1 defect.

Having heard the evidence, Lord Pentland concluded that the pursuer was not driving at excessive speed. He had not failed to exercise reasonable care. He could not be faulted for failing to notice the eroded road surface nor for the line he adopted in negotiating the bend. These findings were not sufficient however to allow the pursuer to establish liability. Rather, Lord Pentland directed himself in accordance with the approach set out by Lord Drummond Young in *Macdonald*.<sup>40</sup>

The pursuer did not challenge the adequacy of the defenders' system or method of inspection but perilled his case on the proposition that Mr McCudden's inspection was negligent because he failed to identify the strip of eroded surface as a category 1b or 1c defect. To establish his case on this "narrow basis" the pursuer required to prove that such a defect existed as at the date of inspection and that Mr McCudden was negligent in failing to identify it. In Lord Pentland's opinion, the pursuer had proved neither of those points. Lord Pentland preferred Mr McCudden's evidence to that of the two police constables. Mr McCudden was clear that there was no reportable category 1b or 1c defect at the time of his inspection and his evidence found support from other witnesses. Moreover, there was no evidence of previous accidents due to the allegedly defective condition of the road or that any other motorcyclists had experienced difficulties because of it.

Those findings were sufficient to allow Lord Pentland to dispose of the action in the defenders' favour. There was, in any event, no evidence which would have allowed him to hold that Mr McCudden's inspection was negligently performed. No witness (other than Mr McCudden) had practical experience of carrying out road inspections. There was therefore no basis on which Lord Pentland could make a finding as to what exactly would have constituted a reasonable (i.e. a non-negligent) inspection in the circumstances. The pursuer's action was accordingly dismissed.

## Conclusion

Difficult questions can arise in relation to the private law liability of public authorities. Policy considerations play an important role and, in many instances, dictate a cautious approach to the duty of care enquiry. *Mitchell v Glasgow City Council*,<sup>41</sup> and *AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board*<sup>42</sup>, for example, demonstrate a restrictive approach to the private law liability of social landlords and the fire service respectively. No such restriction in liability has been applied to roads authorities however. A roads authority remains liable in respect of injuries caused by a "hazard" in circumstances where the authority is at fault in failing to deal with the hazard. The most thorough discussion of the issue in recent years is found in *Macdonald*. The long standing approach of the Scottish courts to the liability of roads authorities was affirmed and, indeed, robustly defended. Lord Drummond Young's judgment clearly emphasises that economic arguments are relevant in this area and that regard must be had to the role of insurance to bear the risk of liability for accidents. In Lord

---

<sup>40</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114

<sup>41</sup> *Mitchell v Glasgow City Council* 2009 S.C. (H.L.) 21

<sup>42</sup> *AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board* [2016] CSIH 3; 2016 S.C. 304

Drummond Young's view, the Scottish approach not only operates rationally but is perhaps more fair and just than the English approach. Moreover, "[i]t may...be that a focused duty, to eliminate hazards, may encourage improvements in road safety more effectively than a general liability of the sort that appeared to be under consideration in the English cases."<sup>43</sup>

Lord Drummond Young's judgment in *Macdonald* would prove to be the starting point for consideration of the issue of roads authority liability in both *Bowes* and *Dewar*. These two cases offer further guidance as to what is required for a successful action against a roads authority in Scotland. What practical advice can be proffered in view of the above case law?

*Bowes* certainly sounds a cautionary note for any roads authority which might be tempted to disregard the safety advice of technical experts.

As far as pursuers are concerned, two features stand out most prominently- first, the need for averments from which the existence of a hazard can be inferred and, second, the need for a secure foundation in the evidence to explain what a reasonable roads authority would have done in the same set of circumstances. The first of these requirements is clearly articulated by Lord Drummond Young in *Macdonald*. There, the pursuer's pleadings did not address adequately the critical question of whether there was a true "hazard". Critically, there were no averments of complaints or of any history of accidents at the locus.<sup>44</sup> Furthermore, practitioners should remain mindful of Lord Pentland's important caution in *Dewar* that evidence requires to be adduced as to what would have amounted to the exercise of an ordinary level of skill and care by the roads authority in the circumstances.

While the common law duty which is imposed on roads authorities in Scotland continues to fulfil "a useful, if limited, function in the system of accident compensation"<sup>45</sup> practitioners acting for pursuers should remain alert to the important cautionary notes sounded in the recent case law.

---

<sup>43</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 at [82]

<sup>44</sup> It will be remembered, too, that in *Dewar*, where the pursuer's action failed, no evidence was adduced of previous accidents due to the allegedly defective condition of the road or that any other motorcyclists had experienced difficulties because of it.

<sup>45</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 at [82]